SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellees.

CONSOLIDATED WITH

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, ET AL.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE—CHICAGO BOARD OF ELECTION COMMISSIONERS.

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QUESTIONS PRESENTED.

1. Whether this Court has jurisdiction to hear on appeal a challenge to the United States Court of Appeal's determination that a certain question was moot, where the mootness ruling does not involve the constitutionality of a State statute.
2. Whether any question of the Board of Election Commissioner's authority to agree to an order "solely as applied" to one particular special election is moot.
3. Whether the Appellant—State should be heard to complain of the District Court's and Chicago Board's alleged lack of authority to consent to a court order where the Appellant—State had agreed to an *identical* type order earlier in the same cause.
4. Whether the conduct of the Board of Commissioners in consenting to an order was proper and lawful.

SUMMARY OF ARGUMENT.

INTRODUCTION.

The Board of Election Commissioners of the City of Chicago, (hereafter called "The Board") was a Defendant in these consolidated cases in the District Court. The Board, however, did not appeal from the District Court's decision(s). The Board, therefore, will respond here *only* to the argument directed at it, as an Appellee, by the Appellant-State Board of Elections in its brief. (Argument II, pp. 17-21)

I.

A. The State Board of Elections here seeks to challenge the decision of the United States Court of Appeals that the question of the authority of the Chicago Board of Election Commissioners to submit to an agreed order of court "solely as applied" to a certain Special Mayoral Election was moot. As the mootness ruling of the Court of Appeals does not involve the constitutional validity of a State statute, this Court lacks jurisdiction to hear this issue on appeal. Title 28 U. S. C. § 1254.

B. Moreover, by the very terms of the order itself, the order lowering signature requirements and extending the filing deadline for all New Parties and Independents was explicitly restricted *solely* to one specific special election. This election is now long over. The order challenged expressly states that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977", certain requirements will be as therein stated. As the order intentionally has no precedential value beyond the specific June 7, 1977 election concerned, the issue is clearly moot. (*North Carolina* v. *Rice,* 404 U. S. 244 (1971); *Mills* v. *Green,* 159 U. S. 651)

C. Even if this Court determines that the Court of Appeals erred in dismissing the State's appeal on mootness grounds, this Court is not a proper forum to consider in the first instance any issue of the Board's authority to enter into judicially approved settlements. This issue should be remanded to the District Court, or the Court of Appeals, for a hearing and/or determination as to this issue.

D. The State should not be heard to complain about the Board's lack of authority, as earlier in the same cause it agreed to an *identical* type order lowering the signature requirements and extending the filing deadline for Independent candidates. (App., p. 60)

E. The conduct of the Chicago Board of Election Commissioners was proper and lawful. The order challenged involved signature and filing deadline requirements for a *special* election. The relevant Illinois provisions make no distinction between a regular statutorily scheduled election and a *special* election to fill an unexpected vacancy, such as was involved in this cause. In other words, the relevant Illinois provisions are structured solely for regularly called elections where the date of the election is known well in advance and petition work can be organized and open-endedly begun well in advance of the final filing date. However, the effect of the application of this statutory set up for regularly scheduled elections to the unexpected special election here was to cause a lack of prior notice and an unreasonably short frame for filing as applied to this special election situation.

The order concerned thus reflects *inter alia* the District Court's determination after reviewing the case facts in a pre-trial conference, that as a factual matter the Illinois filing deadline provisions and provisions requiring 25,000 signatures to run as an Independent or New Party mayoral candidate were unconstitutional, not facially, but *solely as applied* to the special election concerned. The Chicago Board's consent to this order of the District Court, extending the filing deadline and lowering the

signature requirements to 20,000 for all independent candidacies, was merely an acknowledgment, a confession of error, that the filing deadline and 25,000 signature requirement were to that extent unconstitutional *as applied* to the particular special election concerned, at the same time the agreed order preserved the legitimate governmental interest in assuring that only candidates demonstrating significant voter support would attain a position on the ballot.

ARGUMENT.

I.

THIS COURT LACKS JURISDICTION TO REVIEW ON APPEAL A FEDERAL COURT OF APPEALS RULING THAT A CHALLENGE TO A DISTRICT COURT ORDER IS MOOT.

The State Board here seeks to challenge the United States Court of Appeals decision, which dismissed as moot the State's claim that the Chicago Board of Election Commissioners lacked authority to agree to an Order of Court "solely as applied to the Special Mayoral Election" held in Chicago on June 7, 1977. (App., p. 74) The State Board asserts that this issue should not have been considered moot and it thus seeks to appeal here from that portion of the Court of Appeals' decision.

However, this Court's jurisdiction on appeal is expressly limited to those cases in which "a party (relies) on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, Treaties or Laws of the United States . . . and the review on appeal shall be restricted to the federal question presented." 28 U. S. C. § 1254.

Simply put, the mootness ruling of the Court of Appeals does not involve the constitutional validity of a State statute. Consequently the issue may not be heard by this Court on appeal. (see, *e.g., Bradford Electric Light Co., Inc.* v. *Clapper,* 284 U. S. 221 (1931); *Baxter* v. *Continental Casualty Co.,* 284 U. S. 578 (1931).

The State Board's purported appeal of the mootness ruling by the Court of Appeals thus should be dismissed.

II.

ANY QUESTION OF THE BOARD'S AUTHORITY TO AGREE TO AN ORDER "SOLELY AS APPLIED" TO THE SPECIAL ELECTION CONCERNED IS MOOT.

A.

In preface, what was involved here was not a General Election, whose time is fixed by statute, but the first known Special Mayoral Election in the City of Chicago's history. This resulted in a correspondingly very short time frame under statute in which independent and third party candidates could gather petitions. Thus, this was a rare, perhaps even *sui generis,* situation. At the District Court's behest, and with its conference participation, the Chicago Board agreed to an Order *solely* for this special election, lowering the general statutory signature requirements for all Independent and New Party candidates from 25,000 to 20,000 signatures and extending the filing deadline by two weeks.

The State contends that the issue of the Board's action, is "still alive for future elections" and thus is not moot. (Appellant's Brief, p. 19) The State is somewhat obtuse. It fails to appreciate that by the very terms of the order challenged, the order has no precedential value beyond the instant case and election. The order, recognizing the unique character of the instant case, is expressly limited solely to that single, special election. The order explicitly states that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977" the requirements for ballot access will be as therein stated. (App., p. 74) It was only on this non-precedential basis that the Board accepted this order solely for the Special Election concerned. The issue, therefore, is clearly moot. (*e.g., North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971); *Mills* v. *Green,* 159 U. S. 651).

The cases cited by the State are irrelevant here. They all involved the validity of *statutes* which had continuing future effect. None of them concerned, as here, an *order* explicitly

restricted to one election, and one election only. The cause here does not involve a challenge to a state statute involving elections, as the state tries to suggest. (Appellant's Brief, p. 20) It merely involves an attempted challenge of an isolated court order. As the order here, by its very terms, is explicitly restricted solely to just one election which is long over, the issue is not "capable of repetition, yet evading review." Or as the Court of Appeals for the Seventh Circuit here reasoned:

> "The order stated categorically that it applied only to the June 7, 1977 Special Mayoral Election which has long passed. Furthermore, this is not an issue which is 'capable of repetition, yet evading review.' *Defunis* v. *Odegaard,* 416 U.S. 312, 318-19 (1974); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911). We have no reason to believe that a future agreement by an election board to reduce signature requirements and extend filing deadlines in a special election situation, albeit an unlikely occurrence, would evade review. For this reason we dismiss the appeal of the March 17, 1977 order." (Appellant's Jurisdictional Statement App., p. 6a.)

B.

In the alternative, *arguendo,* if this Court should disagree with the Court of Appeals' determination that the issue is moot, this issue of the District Court's and the Board's authority to enter into the Order concerned should be remanded to the Court of Appeals, or the District Court, for a hearing and/or determination as to this issue. It is respectfully submitted that this Court is not the proper forum for the determination of this issue in the first instance.

III.

THE STATE BOARD SHOULD NOT BE HEARD TO COMPLAIN OF THE DISTRICT COURT'S AND CHICAGO BOARD'S ALLEGED LACK OF AUTHORITY.

The State Board should not be heard to complain about the lack of authority of an electoral body in a situation, as here. Earlier in this very same cause, the State Board agreed to an *identical* type order lowering the statutory signature requirements for independent candidates from 63,373 to 35,947 and extending the statutory filing deadline for Independents to April 4, 1977 for this Special Mayoral Election, even though the statute called for a February 19, 1977 filing deadline. (App., p. 60; Ill. Rev. Stat. 46, Par. 10-3)

IV.

THE CONDUCT OF THE CHICAGO BOARD OF ELECTION COMMISSIONERS WAS PROPER AND LAWFUL.

The issue raised by the State Board involves the authority to enter into an agreed order of court "solely as applied" to the Special Mayoral Election concerned. For New Party and Independent candidates, the order lowered the signature requirements from 25,000 to 20,000 and it extended the filing deadline for fourteen days to the day preceding the Special Mayoral Primary Election.

Initially, the Chicago Board strenuously agrees that statutory signature and filing deadline statutes are mandatory and can't be administratively altered. The State Board, however, fails to apprehend the nature of the issue. The March 17 agreed order did not address the *facial* validity of a statute, as a matter of law. Rather it related to the constitutionality of the signature and time filing statute, as *applied* to this unique special election. The validity of this statute, as so applied, is by nature a *factual* issue and thus subject to factual resolution.

The Illinois signature and filing deadline provisions concerned are structured *solely* for regularly statutorily scheduled elections, where the date of the election is known well in advance and there is no barrier to the early circulation of petitions. (Appellant's Jurisdictional Statement App., p. 18a) The Illinois signature and filing deadline provisions, however, make no distinction whatever between a regular election and a special election. The filing deadline and signature requirements are the same for both types of elections. These provisions, therefore, make absolutely no time or signature allowances for the time problems of an Independent type candidacy in an unexpected Special Mayoral Election caused by death. The effect of the application of statutory set up for regularly scheduled elections to this particular special election to fill an unexpected vacancy thus caused a lack of prior notice and an extremely short time frame for filing petitions by all New Party and Independent candidates. It also failed to allow for the fact that the most fruitful time for circulating such petitions is during the closing weeks of the regular parties' primary campaigns. (Appellant's Jurisdictional Statement App., p. 30a)

The Order concerned thus reflects the District Court's recognition and determination, after reviewing the case facts in a pretrial conference, that as a factual matter the Illinois signature and filing deadline provisions for regular elections were unconstitutional as applied to the Special Mayoral Election concerned. The Chicago Board's agreement to this Order was merely an acknowledgement, or even a confession of error, that to the extent the Illinois provisions required more than 20,000 signatures and a truncated 51 day filing deadline they were, as a factual matter, unconstitutional as applied to the special election concerned.*

* "Compromises of disputed claims are favored by the courts." (*Williams* v. *First National Bank*, 216 U. S. 582). In this regard, in addition to the factors described above, the Chicago Board appropriately considered, too, the fact that the Appellee's signature gathering efforts were, in effect, further shortened and psychologically hampered by the fact that they did not know until well into the case what the final maximum signature and deadline requirements would be and thus whether such requirements could potentially be attained.

(Footnote continued on next page.)

It bears noting that the State Board's assertion that the Board altered the statutory requirements is not an accurate characterization of what transpired below. First, it requires stating that the United States District Court, not the Board, lowered the signature requirements and extended the time filing requirements. (App., p. 74). The Board agreed to this District Court Order, after a conference with the Court's participation, under the following circumstances: three days earlier, on March 14, 1977, the District Court had issued a 27 page opinion. In that opinion, the Court *inter alia* had strongly implied that, after an evidentiary hearing, it would further lower the signature requirements for this election from the 25,000 signature maximum to which it had already lowered it without any evidentiary hearing and it would extend the filing deadline to April 18, 1977 (the day preceding the Special Mayoral Primary). (See, e.g., Appellant's Jurisdictional Statement App., pp. 23a, 26a [FN 16], 28a, 32a) Further, and critically, the final sentence of the District Court's opinion then mandated a pretrial conference on March 17, 1977 to schedule a hearing and "to possibly reach a *stipulated agreement* for the regulations pertaining to the instant Mayoral Election". (Emphasis added) (Appellant's Jurisdictional Statement App., p. 32a) Further, in their pleadings, the U. S. Labor Party was requesting that the signature requirements for this election be lowered to 6,545 and the Socialist Workers Party was requesting automatic ballot access without any signature filing requirement whatever. The Board thus was faced with the specter, among other things, of an unmanageable "laundry list" ballot and the administrative and other evils attendant thereto. (See, e.g., *Lubin* v. *Panish*, 415 U. S. 709,

(Footnote continued from preceding page.)

The State Board also seeks to allege that the Board's action contravened the State's supervisory authority under State law. First, the State Board did not seek to assert this issue at the District Court level and it is thus now waived. Secondly, the State's alleged supervisory authority under State law is irrelevant to the alleged Federal questions it seeks to raise here. Finally, there is nothing in State law which confers on the State Board the power or dictatorial authority over the Chicago Board that it seeks to assert here. e.g. Ill. Rev. Stats. Chap. 46 Par. 1A-8.

715-719; *American Party of Texas* v. *White,* 415 U. S. 767, 781-782)

In this case climate, the agreed order for one, was a recognition of reality by the Board, which, nonetheless, still protected for this Special Mayoral Election the legitimate governmental interest against a "laundry list" ballot; assured that only new party or Independent candidates demonstrating significant voter support would attain a position on the ballot;* fulfilled the Board's administrative need to finally set the election calendar and the identity of candidates sufficiently before the election to allow election preparation; and avoided a time-consuming, costly, and probably less successful evidentiary hearing.

There was another pivotally important policy reason why the Chicago Board agreed to an order, lowering signature requirements to 20,000 and extending for two weeks the filing deadline, "solely as applied" to this particular election. After the District Court's Memorandum Opinion of March 14, 1977, in which both sides believed that the Court had mandated them to seek to negotiate a resolution for this election, the New Political Party plaintiff represented to counsel for the Board that in view of the short notice time existing for this election, the New Party still most probably would not be able to make 25,000 signatures by April 18, 1977. The plaintiffs stated that they hopefully could make 15,000 and would even try to make 20,000 signatures by April 18th, if this was the limit of what the Board would accept. The present Chicago Board believes that it should, within the scope of its authority, equally and neutrally favor access to the ballot by all qualified candidates. The Board thus felt, that in the interst of justice and the public interest, it should be flexible as applied to this unique election

* The two plaintiffs-appellees were the only Independent parties or Independent candidates to subsequently attain placement on the ballot.

situation and not rigidly adhere to a technical numbers game, solely to prevent all professedly diligent new political parties from attaining ballot access. As counsel for the Chicago Board stated to the District Court earlier in this cause on February 11, 1977:

> "I think we have some responsibility as an Election Authority to be neutral and to help people get on the ballot rather than to be obstructive. . . ." (P. 8.)

And:

> "I think that that is fair and that's an effort to try to help these people get on the ballot. . . ."

The Chicago Board, therefore, agreed to the negotiated order concerned, for the public benefit of all Legitimate New Party and Independent candidacies.

Finally, the State's suggestion that the Board violated equal protection rights of other new political parties is ludicrous. The State is the one that maintains that the signature requirements for New Political Parties in local elections must remain at 25,000, 35,000 or even 58,000. Meanwhile, the Chicago Board in an effort to assist duly qualified candidacies agreed to lower the signature requirement here to 20,000 equally for *all* New Political Parties and Independent candidates. It is the State Board of Elections, not the Chicago Board, which has been completely insensitive to the problems of new political parties and independent candidates throughout these proceedings. The Board's agreement to an Order to *lower* the signature requirements equally for all new parties and independent candidates from 25,000 to 20,000, *thus making it easier for all new parties to gain ballot access,* clearly does not constitute a violation of the equal protection clause.

Wherefore, the conduct of the Chicago Board in this case was clearly proper and lawful.

CONCLUSION.

For reasons stated above, the Respondent Board of Election Commissioners of the City of Chicago urge that as to the matters contained in Appellant's argument II, this Court either dismiss the appeal or affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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